

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ERIC LEE CLARK,
Appellant.

No. 2 CA-CR 2015-0369
Filed October 18, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20150132001
The Honorable Casey F. McGinley, Judge Pro Tempore

AFFIRMED

COUNSEL

Steven R. Sonenberg, Pima County Public Defender
By Abigail Jensen, Assistant Public Defender, Tucson
Counsel for Appellant

STATE v. CLARK
Decision of the Court

MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

H O W A R D, Presiding Judge:

¶1 After a jury trial, Eric Clark was convicted of possession of methamphetamine for sale, possession of drug paraphernalia, and possession of a weapon during commission of a felony drug offense. The trial court sentenced him to concurrent prison terms, the longest of which is 15.75 years. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), asserting she has reviewed the record but found no arguable issue to raise on appeal. Consistent with *Clark*, 196 Ariz. 530, ¶ 32, 2 P.3d at 97, she has provided “a detailed factual and procedural history of the case with citations to the record” and asks this court to search the record for error. Clark has filed a supplemental brief arguing: (1) his appellate counsel failed to comply with *Anders*; (2) the state did not demonstrate that exhibits admitted into evidence were the same items that had been seized by police officers; (3) allowing jurors to ask questions violated his right to an impartial jury; (4) the state did not “provide any proof” that the substance found in his vehicle was a dangerous drug; (5) the jury instructions were “incomplete”; and (6) the state’s closing argument was inconsistent with the jury instructions regarding possession.

¶2 Viewing the evidence in the light most favorable to sustaining the jury’s verdicts, *see State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), sufficient evidence supports them here. In December 2014, a police officer stopped a vehicle Clark was driving; Clark gave his brother’s name to the officer but was arrested when a records check revealed his brother’s license was suspended. An inventory search of the vehicle uncovered, in a box behind the driver’s seat, a revolver and a bag containing twenty

STATE v. CLARK
Decision of the Court

smaller bags of methamphetamine; the amount of methamphetamine—more than half a pound—and the packaging were consistent with the drugs being for sale. A.R.S. §§ 13-3102(A)(8), 13-3401(6)(c)(xxxviii), 13-3407(A)(2), 13-3415(A). And sufficient evidence supports the jury’s additional finding that Clark was on probation at the time of his offense, as well as the trial court’s finding that Clark had at least two historical prior felony convictions. His sentences are within the statutory range and were properly imposed. A.R.S. §§ 13-703(C), (J), 13-3102(M), 13-3407(B)(2), 13-3415(A).

¶3 Turning to the arguments Clark has presented in his supplemental brief, he first asserts his appellate counsel did not comply with *Anders* because she ignored meritorious issues. This argument, which is essentially a claim of ineffective assistance of appellate counsel, cannot be raised on appeal and we therefore do not address it further. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002).

¶4 Clark next contends that “structural or fundamental error” occurred because the jury was shown only a larger bag containing the twenty individual bags of methamphetamine, rather than the individual bags, and because there was insufficient evidence that the methamphetamine identified was “the drugs recovered in the instant case.” But the parties stipulated that the substance contained in the bags was methamphetamine and that the state had maintained a proper chain of custody for that evidence. And there was ample evidence that the exhibits shown to the jury were the items found in Clark’s vehicle.

¶5 In a related argument, Clark asserts the state failed to prove the drugs in his possession were dangerous drugs, claiming there is no evidence the substance in the bags was methamphetamine and claiming it was, in fact, “an imitation controlled substance.” In making this argument, however, Clark relies on documents attached to his brief that are not in the record. We therefore do not consider those documents. *See State v. Schackart*, 190 Ariz. 238, 247, 947 P.2d 315, 324 (1997) (“Because our court does not act as a fact-finder, we generally do not consider materials that

STATE v. CLARK
Decision of the Court

are outside the record on appeal.”). And, again, the parties stipulated the substance was methamphetamine. To the extent Clark asserts the stipulation is false, nothing in the record supports that claim.

¶6 Clark further complains that allowing jurors to ask questions violated his right to an impartial jury pursuant the Sixth Amendment to the United States Constitution. Juror questions are permitted pursuant to Rule 18.6(e), Ariz. R. Crim. P. And no violation of Clark’s constitutional rights occurred by allowing the jury to ask questions¹; this procedure has long been held constitutional in Arizona. *State v. Greer*, 190 Ariz. 378, 379-80, 948 P.2d 995, 996-97 (App. 1997).

¶7 Clark also contends the jury instructions were “incomplete” because the jury was not instructed “on the State’s burden to prove the actual content of each baggie or the police[] failure to maintain a proper chain of custody; or if the state fails to produce the actual evidence seized, how they should regard that evidence.” We have found no authority suggesting such instructions are required.

¶8 Clark further asserts the state’s closing argument was inconsistent with the jury instruction for possession because the prosecutor stated that the fact he was “in control of the vehicle” and was “responsible for knowing [its] legal condition” was sufficient for the jury to conclude he knowingly possessed the methamphetamine. Even if we agreed such a statement would be improper, we find no argument by the prosecutor that Clark was in possession of the drugs because of some obligation to know the

¹Clark also claims, without explanation, that this procedure violates his “right to the effective assistance of counsel.” We see no relationship between allowing jurors to ask questions and a violation of the right to counsel.

STATE v. CLARK
Decision of the Court

condition of the car he was driving.² We therefore do not address this argument further.

¶9 Pursuant to our obligation under *Anders*, we have searched the record for fundamental error and found none. *See State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985). And we have rejected the issues raised in Clark’s supplemental brief. We therefore affirm his convictions and sentences.

² The prosecutor observed, correctly, that Clark was “in control” of the car, as its sole occupant.